Between the Lines of the Vienna Convention?

Canons and Other Principles of Interpretation in Public International Law

Edited by

Joseph Klingler
Yuri Parkhomenko
Constantinos Salonidis

Wolters Kluwer

CHAPTER 9
Per Argumentum a Fortiori

Alina Miron[*]

§9.01 INTRODUCTION

Argumentum a fortiori is shrouded in mystification.[1] It looks like Latin, yet the Latinists warn it is incorrect, scholastic Latin.[2] It is said to designate a logical and legal argument, yet it lost this specificity to enter the common language and the ordinary dictionaries. The Latin phrase is translated as meaning: 'even more true', 'by even greater logical *necessity*', 'with even greater force', 'all the more', 'for an even stronger reason', '*à plus forte raison*', '*a maggior ragione*', '*con mayor razón*'. The Oxford Dictionary defines it as a '[phrase] used to express a conclusion for which there is stronger evidence than for a previously accepted one',[3] while the Merriam-Webster Collegiate Dictionary considers it is 'used in drawing a conclusion that is inferred to be even more certain than another'.[4] The French dictionary of reference, *Le Petit Robert*, defines it as '*En concluant de la vérité d'une proposition à la vérité d'une autre pour laquelle la raison invoquée s'applique encore mieux*'.[5]

Law dictionaries define *a fortiori* as 'a term used in logic to denote an argument to the effect that because one ascertained fact exists, therefore another, which is

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1. In full, it should actually be *a fortiori causa/ ratione*.
2. Jacques Cellard, *A priori et a fortiori sont dans un bateau…*, Le Monde (15 Dec. 1980).
3. Oxford Reference, *Encyclopedic Dictionary of International Law*, https://en.oxforddictionaries.com/definition/a_fortiori (accessed 1 May 2018).
4. *Merriam-Webster Collegiate Dictionary*, https://www.merriam-webster.com/dictionary/a%20fortiori (accessed 25 May 2018).
5. Josette Rey-Debove & Alain Rey, *Le Petit Robert 2011*, 66 (Le Robert 2010). 'Inferring from the truth of one proposition the truth of another one for which the given reason applies even better'. (author's translation).

included in it or analogous to it, and which is less improbable, unusual or surprising, must also exist'.[6] In legal writing, *a fortiori* operates indeed like a logical inference: it allows one to conclude that *B* is necessarily true simply because *A* has already been ascertained to be true (e.g., *If dolphin conservation falls under Article 65 UNCLOS (Marine mammals), so is* a fortiori *the case of whales*).

All these definitions and translations designate *a fortiori* as a compelling and indefeasible logical argument. As a logical argument, *a fortiori* is meant to instil universality and certainty to legal argumentation. However, before embracing the virtues of legal logic, one should consider two obvious objections. As Chaïm Perelman showed, argumentation and logic must be distinguished: legal arguments are meant to convince an audience, not to establish an indisputable truth.[7] Thus legal argumentation pertains more to the realm of rhetoric than to formal logic. Unsurprisingly, *a fortiori* is more commonly used as a figure of speech – the final, fatal blow in a disputation. The distance from a logical to a rhetorical argument is slim and the line is quite often trespassed in argumentation, whether legal or not.

Furthermore, it is an argument of subsidiary importance, like many other pseudo-logical arguments. Unlike interpretation in domestic law, interpretation in international law follows an established method, due to its codification in Articles 31–33 of the Vienna Convention on the Law of Treaties. As Panos Merkouris underlines, interpretation in international law 'is regulated by rules, which to the degree possible, ensure legal certainty, a main goal of legal science. It is no coincidence, that all international courts and tribunals, either explicitly or implicitly follow the process of treaty interpretation enshrined in Articles 31–33 of the VCLT'.[8] In a perelmanian world, the concept of legal science may appear overrated, but legal certainty is a shared goal. The codification of the technique and method of interpretation by the Vienna Convention on the Law of Treaties (VCLT) serves this purpose well.

The drafters of the Convention made the deliberate choice of defining a standard method, rather than compiling a catalogue of logico-legal maxims. Thus, the Special Rapporteur Sir Humphrey Waldock considered that the subject of treaty interpretation

6. *Black's Law Dictionary* 5 (4th ed., West Publishing Company, 1968).
7. Robert Legros, *Chaïm Perelman*, in *Nouvelle biographie nationale* 293 (1997), t. IV: 'The fundamental idea behind Perelman's doctrine is that legal logic, notably that applied by the judge, does not get confused with formal logic. It is a specific logic. Law, and in particular the reasoning of the judge, just like other social sciences, morals and philosophy, eludes formal logic because it is not founded on certain truths. Law is not an exact science. The ultimate goal of legal science, which is neither demonstrative nor purely rational but which seeks to convince with a view to social peace through justice, is to end up with a reasonable solution, acceptable in the respect of values, the first of which is justice (*Translated from the French by Catherine Hall*)'. Chaïm Perlman's major essays: Chaïm Perelman, *De la Justice* 83 (Office de publicité 1945); Chaïm Perelman & Lucie Olbrechts-Tyteca, *Traité de l'argumentation: la nouvelle rhétorique* 740 (Editions de l'Université de Bruxelles 6th ed., 2008); Chaïm Perelman, *Logique juridique, nouvelle rhétorique* 193 (Dalloz 1976).
8. Panos Merkouris, *Interpretation is a Science, Is an Art, Is a Science* in, *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* 11 (M. Fitzmaurice & P. Merkouris eds, Brill 2010).

'was a vast and difficult one and *he was anxious not to penetrate too deeply into the realm of logic*'.[9] Recourse to maxims appeared to him as aleatory and subjective:

> [M]axims in international practice … are, for the most part, principles of logic and good sense valuable only as guides to assist in appreciating the meaning which the parties may have intended to attach to the expressions that they employed in a document. Their suitability for use in any given case hinges on a variety of considerations which have first to be appreciated by the interpreter of the document. Even when a possible occasion for their application may appear to exist, their application is not automatic but depends on the conviction of the interpreter that it is appropriate in the particular circumstances of the case. In other words, recourse to many of these principles is discretionary rather than obligatory.[10]

Thus, Sir Humphrey insisted upon the distinction between maxims, on the one hand, and technique or methods of interpretation, on the other,[11] and decided to codify only the latter. 'Unlike techniques [which relate to procedure rather than content], maxims do not describe a structured way of arriving at the meaning of a text but present standard arguments that have often been applied and, therefore, carry certain relevance'.[12] In practice, the codification of the technique has not ruled out maxims. However, their importance in international jurisprudence has decreased and become subsidiary.[13] The study of case law shows indeed that maxims now normally come into play after the interpreter has undergone the method of interpretation codified in Article 31 of the VCLT, either independently or integrated among the subsidiary means of interpretation of Article 32 of the VCLT. In any case, their assigned role is generally to confirm the meaning determined through the standard method.

Per argumentum a fortiori fits particularly well in this general landscape: it takes the appearance of a logical, indefeasible argument, the *modus operandi* of which rests upon a reinforced analogy (1.02). Despite its apparent simplicity and attractivity, it

9. International Law Commission, *726th Meeting: Law of Treaties*, 1 Y.B. Int'l L. Comm'n 20, ¶ 4 (1964) (emphasis added).
10. Humphrey Waldock, *Third Report on the Law of Treaties*, 2 Y.B. Int'l L. Comm'n 200, ¶ 5 (1964).
11. *See ibid.*, p. 54, ¶ 5. The choice was not obvious to all the members of the ILC. Thus, Sir Gerald Fitzmaurice was opposed to hard-and-fast rules telling tribunals how to read treaty provisions, suggesting instead the listing of a code of principles or maxims that could possibly be relied on by tribunals to justify their decisions. *See* Jan Klabbers, *Virtuous Interpretation*, in *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* 1 (M. Fitzmaurice, E. Olufemi & P. Merkouris eds, Nijhoff 2010). Sir Gerald identified six principles regularly used by the PCIJ and by the ICJ: *The Law and Procedure of the International Court of Justice 1951–1954*, 33 Brit. Y.B. Int'l L. 210–212 (1957).
12. Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* 116–117 (Cambridge 2015).
13. This may be contrasted with the legal orders in which there is no codified method of interpretation and logical canons of construction like *a fortiori* play an important role. Several studies were indeed devoted to the use of *a fortiori*. For instance, in talmudical hermeneutics, where the argument called *Kal va-chomer*, *see inter alia* Avi Sion, *A Fortiori Logic: Innovations, History and Assessments* (The Logician 2013); Stefan Goltzberg, *The A Fortiori Argument in the Talmud*, in *Judaic Logic* (Gorgias Press 2010); but also in Islamic jurisprudence – *see* Wael B. Hallaq, *Logic, Formal Arguments and Formalization of Arguments in Sunni Jurisprudence*, 37(13) Arabica 315–358 (1990).

plays a subsidiary role, proving to be in the end more an artifice of rhetoric, than an operative maxim of interpretation (1.03).

§9.02 THE *MODUS OPERANDI* OF *A FORTIORI*

[A] *A Fortiori* Without *Ratio Legis*?

Two related operations stand at the basis of the argument *a fortiori*: an analogy and then an implied inference. Like all analogies, *a fortiori* allows for a previous conclusion to be automatically applied to a new legal situation/proposition. However, going further in the analysis, legal theorists have stressed the fact that, beyond the mere comparison, *a fortiori* relies upon a third element, the *ratio legis* (i.e., the reason or principle behind a law) or the *ratio decidendi* (the principle, ground or reason for the decision in a case, often a statement of law). This is the common reference, the hard core present in both poles of comparison. As Chaïm Perelman underlined:

> *L'argumentum a fortiori s'appuie non pas sur la similitude du cas soumis au tribunal avec un précédent approprié, mais sur la* ratio decidendi, *la raison alléguée pour trancher le cas antérieur d'une façon déterminée. Il s'appuie de même sur l'esprit de la loi. L'argument a fortiori prétend que la raison alléguée en faveur d'une certaine conduite ou d'une certaine règle dans un cas déterminé s'impose avec une force plus grande encore dans le cas actuel.*[14]

The conclusion is obvious because the *ratio legis* applies with even greater force to the second pole than to the first. A simple hypothetical example is: the treaty's object and purpose is to protect endangered species. If it interpreted to forbid the taking of sperm whales, then it will *a fortiori* apply to blue whales, which are species menaced with extinction.

The problem, however, is that the *ratio legis* is rarely stated in legal reasoning where *a fortiori* comes into play and has to be separately identified. It is for the analyst to uncover it in the demonstration. Some examples from international jurisprudence illustrate this major difficulty with the argument *a fortiori*.

In its first contentious decision in the *Wimbledon* case, the Permanent Court of International Justice had to determine whether Germany could, in order to implement is laws on neutrality, forbid the passage through the Kiel Canal of neutral vessels carrying contraband of war. Since neutrality rests upon the prohibition to side directly or indirectly with a belligerent, Germany could have been under a duty to prohibit the

14. Chaïm Perelman, *Logique juridique. Nouvelle rhétorique* 8 (Dalloz 1999) (first published: 1976). In the same vein, *see* Robert Kolb, *Interprétation et création du droit international: esquisses d'une herméneutique juridique moderne pour le droit international public* 738 (Bruylant 2006).

> Our translation of the quote from Perelman: The *argumentum a fortiori* does not rely on the similarity of the case submitted to the tribunal with an appropriate precedent but on the *ratio decidendi*, the reason alleged to settle the previous case in a given way. It also relies on the spirit of the law. The argument *a fortiori* claims that the alleged reason in favor of a certain behaviour or a certain rule in a given case establishes itself with an even greater strength in the present case.

passage of such ships through the Kiel Canal. Relying on Article 380 of the Treaty of Versailles, which establishes a particular regime for the Canal, the Court held that this provision:

> lays down that the Kiel Canal shall be maintained free and open to the vessels of commerce and war of all nations at peace with Germany [;] it is [thus] impossible to allege that the terms of this article preclude, in the interests of the protection of Germany's neutrality, the transport of contraband of war … [I]t follows *a fortiori* that the passage of neutral vessels carrying contraband of war is authorized by Article 380, and cannot be imputed to Germany as a failure to fulfil its duties as a neutral.[15]

The paragraph is hardly understandable on a quick reading. First, because the concept 'contraband of war' is not defined. In 1927, its meaning may have seemed obvious – it is much less so to the contemporary reader.[16] Second, the PCIJ did not identify the *ratio legis* of Article 380, which resulted from the specific intention of the drafters of the Treaty to keep the Kiel Canal open to navigation in all circumstances and for all ships, irrespective of their cargo. In the absence of these clarifications, the Court's reasoning is elliptic and the argument – to employ the maxim subject of this chapter – *a fortiori* lacks persuasive force.

The PCIJ's reasoning in the *Turkey-Iraq (frontier)* case is equally obscure, absent the identification of the *ratio legis*. In this advisory opinion, the Court concluded that the votes of the representatives of the interested Parties were not required to unanimously adopt a decision by the Council of the League of Nations establishing the frontier between Turkey and Iraq. The Court relied on the exclusion of the votes of the interested parties from the procedure for adopting binding recommendations (cf. Article 15, paragraphs 6 and 7 of the Covenant of the League of Nations) to extend this conclusion to decisions adopted by the Council. The conclusion was reached despite the fact that Article 5 of the Covenant clearly provided that 'decisions … shall require the agreement of all the Members of the League represented at the meeting'. The Court's conclusion rested upon the mechanical application of *a fortiori*:

> It is hardly open to doubt that in no circumstances is it possible to be satisfied with less than this conception of unanimity, for, if such unanimity is necessary in order to endow a recommendation with the limited effects contemplated in paragraph 6 of Article 15 of the Covenant, it must *a fortiori* be so when a binding decision has to be taken.[17]

Though dispositive for the Court's conclusion, the argument is not persuasive. First because the *a minori ad majus*[18] is not of obvious application to authorizations: in the present case, its application leads to the illogical conclusion that if the Council

15. *S.S. 'Wimbledon'*, Judgment (17 Aug. 1923), PCIJ Series A, No. 1, pp. 29–30.
16. According to the definition in the *Encyclopaedia Britannica*: 'Contraband, in the laws of war – goods that may not be shipped to a belligerent because they serve a military purpose'. https://www.britannica.com/topic/contraband (accessed 7 May 2018).
17. *Article 3, Paragraph 2, of the Treaty of Lausanne (frontier between Turkey and Iraq)*, Advisory Opinion (21 Nov. 1925), PCIJ Series B, No. 12, p. 32.
18. On the difference between *a minori ad majus* and *a majori ad minus*, *see infra*, sub-section B.

could adopt *recommendations* without the vote of the interested parties, it could also adopt *decisions* under the same circumstances. Yet, this is illogical: the conditions for adopting binding decisions are generally more stringent than those set out for adopting recommendations. Second, the procedure for adopting decisions is specifically referred to in Article 5, which requires full unanimity. Thus, the Court's use of *a fortiori* is not compelling. This being said, it is not because the reasoning is not persuasive that the conclusion is necessarily wrong. In fact, the Court applied the proper *lex specialis*, according to the subject-matter of the texts adopted. It considered that the settlement of disputes was addressed by Article 10, and therein the rule of unanimity was understood as excluding the votes of the interested Parties. It mattered little whether the instruments adopted by the Council were called decisions or recommendations, since even the latter had binding effects towards the members. The decision establishing the frontier between Turkey and Iraq was one settling the dispute between those two parties. Article 10 was then the proper rule to be applied in this circumstance.

The decisions of the Franco-Italian Commission of Conciliation established by the 1947 Treaty of Peace are emblematic both for their extensive recourse to logical maxims and for their difficult apprehension. The Commission had to determine whether the former African colonies of Italy, as well as Albania and Ethiopia, were among the 'transferred or ceded territories [in French: *territoires cédés*]' within the meaning of the Peace Treaty. The term was not defined in the Treaty, but the Commission held that it referred to the territories the sovereignty of which was transferred from Italy to the Allies and Associated Powers. The Commission held that:

> *si l'article 21, par. 4, dispose expressis verbis que 'le Territoire Libre de Trieste ne sera pas considéré comme territoire cédé, au sens de l'article 19…', cela n'autorise pas une argumentation a contrario, c'est-à-dire la conclusion que l'Ethiopie, l'Albanie et les anciennes possessions italiennes en Afrique devront être considérées comme territoires cédés, mais bien plutôt une argumentation a fortiori: si même le Territoire Libre de Trieste ne doit pas être considéré comme territoire cédé, à plus forte raison cela vaut-il pour l'Ethiopie, l'Albanie et les possessions territoriales italiennes en Afrique. Il y a lieu de rappeler, en effet, que la notion technique ou propre de cession de territoire dans le Traité correspond assez exactement au sens qu'attribue à ces mots le droit international public. La doctrine moderne décompose, en effet, ordinairement l'opération de la cession en deux actes successifs: l'abandon par l'Etat cédant de sa compétence territoriale étant suivi de l'établissement de la sienne par l'Etat annexant ou cessionnaire … Les deux actes se retrouvent dans les opérations stipulées aux articles 6, 11 et 14 du Traité. Le second acte, en tout cas, fait par contre défaut dans les opérations visées … Quant à la mention expresse (art. 21, par. 4, du Traité) que les dispositions économiques et financières de l'Annexe XIV ne sont pas applicables au Territoire Libre de Trieste, pour lequel les dispositions économiques et financières sont établies par l'Annexe X, c'est l'argument a fortiori et non celui a contrario qui s'impose en ce qui concerne l'Ethiopie, l'Albanie et les possessions italiennes en Afrique, cela pour des raisons analogues à celles qui ont été développées plus haut au sujet de la portée territoriale de l'article 19.*[19]

19. Author's translation:

The Commission had recourse to a panoply of logical inferences. It first rejected the argument *a contrario*: the Treaty expressly identified the Free Territory of Trieste as a *non-ceded* territory, yet that did not mean that all the other territories to which Italy renounced were *ipso facto* ceded territories. The argument *a contrario* was thus inoperant. The Commission then relied on the argument *a fortiori* to conclude that the former colonies Ethiopia and Albania could not be among the ceded territories. The argument plays an essential role in the Commission's reasoning, but it can only be understood if the underlying *ratio legis* is identified. Yet this one is hidden in a mass of literal and contextual arguments. Relying on doctrinal definitions, the Commission underlines that the ceded territories are those to which one State renounced sovereignty in order to transfer it to another. If the Peace Treaty deprives Italy of its sovereignty over the former colonies, it does not actually transfer it to another State or another entity. The argument *a fortiori* comes into play through a comparison with the status of the Free Territory of Trieste (FTT): if the Parties organized a special regime of co-sovereignty for the FTT, excluding it from the generic category of ceded territories, they must also have intended to exclude the former colonies, for which no regime of transfer of sovereignty had been established. The reasoning may be debated, but the conclusion seems supported by a contextual interpretation. In any event, even if the Commission presents it as the obvious outcome of logical reasoning, its conclusion does not flow easily from the application of *a contrario* and *a fortiori* – indeed, the extensive quote above is more confusing than illuminating.

By contrast, when the *ratio legis* is clearly identified, the reasoning is also clear. The treatment of additional claims by the ICJ is topical. The Court declares them inadmissible because their acceptance would constitute a departure from the condition set out in Article 40 of the Statute, according to which the Application must indicate the subject of the dispute. New claims could thus transform the subject-matter of the

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If Article 21 para. 4 expressly provides that 'the Free Territory of Triste will not be considered as ceded territory within the meaning of Article 19…', this doesn't allow a reasoning a contrario*, according to which Ethiopia, Albania and the former possessions of Italy in Africa should be considered as ceded territories, but rather an argumentum* a fortiori*: if the Free Territory of Trieste cannot be considered as a ceded territory, this applies to even greater force to Ethiopia, Albania and the Italian territorial possessions in Africa. It is important to note in this respect that the technical or specific concept of cession of territory in the Treaty corresponds quite exactly to the meaning given to these words in public international law. Modern doctrine usually breaks down the cession operation in two consecutive acts: the abandonment of sovereignty over the territory by the ceding State followed by the establishment of its sovereignty by the annexing or transferee State … Both acts can be found in the operations provided for in articles 6, 11 and 14 of the Treaty. By contrast, the second act is absent from the targeted operations … Regarding the express stipulation (art. 21, par. 4 of the Treaty) according to which the economic and financial provisions of Annex XIX are not applicable to the Free Territory of Trieste, for which specific economic and financial regulations are established by Annex X, again it is the argument* a fortiori *instead of* a contrario *which becomes applicable with regard to Ethiopia, Albania and the Italian possessions in Africa, for reasons similar to the one developed above concerning the territorial scope of article 19.*

dispute, which can be problematic for many reasons (for instance, if consent to jurisdiction is limited *ratione materiae*). The later the claim is introduced the fewer are its chances to be admissible. Logically, if a new claim introduced in the Memorial is in general inadmissible, such is *a fortiori* the case for a later one, introduced in the Rejoinder or the oral hearings:

> the Court has concluded that additional claims formulated in the course of proceedings are inadmissible if they would result, were they to be entertained, in transforming 'the subject of the dispute originally brought before [the Court] under the terms of the Application' … In this respect, it is the Application which is relevant and the Memorial, 'though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein' … *A fortiori, a claim formulated subsequent to the Memorial*, as is the case here, cannot transform the subject of the dispute as delimited by the terms of the Application.[20]

This example thus demonstrates that once the *ratio legis* is clearly articulated, the conclusion flowing from *a fortiori* reasoning becomes obvious. The challenge is that in most cases the *ratio legis* is left unspecified. This makes reasoning *a fortiori* frustratingly obscure. This is true both in international law and in domestic law. Luis Duarte d'Almeida reached the same conclusion in his article analysing the use of *a fortiori* by UK judges:

> Perhaps the most notable feature of *a fortiori* arguments is that very often an arguer who offers an argument of that kind will leave almost every essential component of the inference unstated. The crucial elements of the argument—the premises on which the arguer is relying, or needs to be relying in order for the inference to run—are typically omitted, if not concealed, in what an arguer actually says or writes. This may lend a *fortiori* arguments considerable rhetorical strength. But it makes it all the more difficult to assess whether the argument being given really is a good one.[21]

20. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment (30 Nov. 2010), ICJ Reports 2010, p. 639, ¶ 39. In the same vein:

> It is well established in the Court's jurisprudence that the parties to a case cannot in the course of proceedings 'transform the dispute brought before the Court into a dispute that would be of a different nature' … In other words: 'the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the [1936] Rules which provide that the Application must indicate the subject of the dispute' … *A fortiori, the same applies to the case of counter-claims*, having regard to the provisions of Article 80 of the Rules of Court, and in particular taking into account the fact that it is on the basis of the counter-claim as originally submitted that the Court determines whether it is 'directly connected with the subject-matter of the claim', and as such admissible under that text.

Oil Platforms (Islamic Republic of Iran v. United States of America), Judgment (6 Nov. 2003), ICJ Reports 2003, p. 161, ¶ 117 (emphasis added).

21. Luís Duarte d'Almeida, *Arguing a fortiori*, 80(2) Modern L. Rev. 202–237 (2017).

[B] The Two Versions of *a Fortiori*: *A Majori ad Minus* and *a Minori ad Majus*

As an analogy, the argument *a fortiori* rests upon the comparison between two concepts/situations/legal concepts/legal propositions. It is usually situated alongside *a pari* or *a simili* (in a similar situation), it being understood that it is a reinforced analogy.[22] As such, its use should lead the audience to the inescapable conclusion that the same solution applies to the latter as to the former proposition. The argument *a fortiori* is usually subdivided in two branches, *a majori ad minus* (from bigger to smaller)[23] and the reverse, *a minori ad majus* (an inference from smaller to bigger).[24]

International jurisprudence contains uses of both figures. Applying an *a minori ad majus* reasoning, in the *Legal status of Eastern Greenland*, the PCIJ first concluded that the Ihlen declaration was binding upon Norway and, as a result, that Norway had to recognize Denmark's sovereignty over Greenland. From this legal assertion, the Court triggered two consequences: Norway was under 'an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and *a fortiori* to refrain from occupying a part of Greenland'.[25]

To take another example, in the *Factory at Chorzów*, the PCIJ held that 'if expropriation in consideration of an indemnity is prohibited …, *a fortiori* is a seizure, without compensation to the interested Parties, prohibited'.[26] Finally, in *Kasikili Sedudu Island*, the Court concluded that:

> the … events, which occurred between 1947 and 1951, demonstrate *the absence of agreement* between South Africa and Bechuanaland with regard to the location of the boundary around Kasikili/Sedudu Island and the status of the Island. Those events cannot therefore constitute 'subsequent practice in the application of the treaty [of 1890] which establishes the agreement of the parties regarding its interpretation' (1969 Vienna Convention on the Law of Treaties, Art. 31, para. 3 (b)). *A fortiori*, they cannot have given rise to an 'agreement between the parties regarding the interpretation of the treaty or the application of its provisions' (*ibid.*, Art. 31, para. 3 (a)).[27]

Of course, once the Court qualified a factual situation as a non-agreement, it excluded it from the scope of all provisions which refer to agreements, either informal or formal.

22. Stefan Goltzberg, *Théorie bidimensionnelle de l'argumentation juridique* 72 (Primento Digital 2013).
23. In French, 'qui peut le plus peut le moins'.
24. In French, 'qui ne peut pas le moins ne peut pas le plus'.
25. *Legal status of Eastern Greenland (Denmark v. Norway)*, Judgment (5 Apr. 1933), PCIJ Series A/B, No. 53, p. 55 (emphasis added).
26. *Factory at Chorzow (Germany v. Poland)*, Judgment (26 Jul. 1927), PCIJ Series A, No. 9, p. 31.
27. *Kasikili/Sedudu Island (Botswana v. Namibia)*, Judgment (13 Dec. 1999), ICJ Reports 1999, p. 1045, ¶ 63 (emphasis added); other examples of the use of *ad minori ad majus*: *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v. United States of America)*, Merits, Judgment (27 Jun. 1986), ICJ Reports 1986, p. 14, ¶ 110; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment (20 Apr. 2010), ICJ Reports 2010, p. 14, ¶ 144.

In all these cases, the Court determined the scope and effects of a legal rule by an automatic application of the argument *a fortiori*. Its persuasiveness comes from the conjunction of two elements: first, the applicable legal principle and their *ratio legis* are clearly identified; second, the particular consequences triggered by the Court pertain to the same categories, which makes the analogy all the more plausible. At the same time, the use of the argument *a fortiori* is purely rhetorical and adds nothing to the demonstration. As will be seen below, *a fortiori* is a shortcut for argumentation rather than a maxim of interpretation.[28]

The argument *a majori ad minus* is less often employed, but is not completely absent from the case law. It may serve to determine the scope of a prohibition, like for the contraband of war in the *Wimbledon* case.[29] The European courts employ this form more frequently, in particular when they are called to determine the scope of authorizations granted to States or to EU institutions.[30] To take just one example, the ECHR considered that States enjoy a large margin of appreciation to implement social and economic policies, and that this liberty is all the more important when these policies are meant to redress the consequences of a regime which is incompatible with the liberal approach of the Convention (typically, the communist regimes in Eastern Europe):

> 37. The enactment of laws providing for rehabilitation, restitution of confiscated property or compensation for such property obviously involved comprehensive consideration of manifold issues of a moral, legal, political and economic nature. In a different context, the Court has held that the national authorities of the Contracting States have a wide margin of appreciation in assessing the existence of a problem of public concern warranting specific measures and in implementing social and economic policies …
>
> 38. A similar approach is *a fortiori* relevant as regards rehabilitation and restitution laws adopted in the above context, such as the 1991 Act.[31]

Of course, it is not always easy to make the distinction between the two versions *of a fortiori*. This logical confusion may be illustrated by the *Barbados v. Republic of*

28. *See infra* §9.03[A].
29. *See also supra* §9.02[A].
30. For ECJ cases, *see*: *Maximillian Schrems v. Data Protection Commissioner & Digital Rights Ireland Ltd.*, CJEU Case No. C-362/14, Judgment (6 Oct. 2015), ¶ 62; *Lighting Poland SA & Philips Lighting BV v. Council of the European Union, Hangzhou Duralamp Electronics Co., Ltd, GE Hungary Ipari és Kereskedelmi Zrt. (GE Hungary Zrt.), Osram GmbH, European Commission*, CJEU Case No. C-511/13 P, Judgment (8 Sep. 2015), ¶ 55.
31. *Kopecky v. Slovakia*, ECtHR App. No. 44912/98, Judgment (28 Sept. 2004), ¶¶ 37–38. Yet, in this case, the ECHR seemed to consider that the argument *a fortiori* was not self-sufficient. It thus added another argument, concerning the application *ratione temporis* of the Convention:

> [T]he Court reiterates that the Convention imposes no specific obligation on the Contracting States to provide redress for wrongs or damage caused prior to their ratification of the Convention. Similarly, Article 1 of Protocol No. 1 cannot be interpreted as restricting the freedom of the Contracting States to choose the conditions under which they agree to return property which had been transferred to them before they ratified the Convention.
>
> *Ibid.*, ¶ 38.

Trinidad and Tobago award, where the tribunal considered that if the parties could not agree on the legal principles applicable to delimitation, they could not have reached an agreement on the delimitation line through application of those principles:

> The fact that the precise scope of the dispute had not been fully articulated or clearly depicted does not preclude the existence of a dispute, so long as the record indicates with reasonable clarity the scope of the legal differences between the Parties. *The fact that in this particular case the Parties could not even agree upon the applicable legal rules shows that* a fortiori *they could not agree on any particular line which might follow from the application of appropriate rules.* Accordingly, to insist upon a specific line having been tabled by each side in the negotiations would be unrealistic and formalistic. In the present case the record of the Parties' negotiations shows with sufficient clarity that their dispute covered the legal bases on which a delimitation line should be drawn in accordance with international law, and *consequently* the actual drawing of that line[32]

The Tribunal seems to apply here the *a minori ad majus* argument. Yet, to States, the delimitation line is more important than the legal principles applicable to delimitation, of which they can dispose. In negotiations, States rarely follow any established method of delimitation. Maritime delimitation negotiations are frequently influenced by extra-legal considerations – political, historical, economic, and so on. The Tribunal's misleading application of the argument *a fortiori* led it to conclude that the Parties did not need to have clearly articulated their claims during negotiations. But this is problematic not only for determining the scope of the dispute, but also the area in dispute, to which a particular regime applies as per Articles 74-3 and 83-3 of UNCLOS.

§9.03 THE FUNCTIONS OF *PER ARGUMENTUM A FORTIORI*

International jurisprudence shows that *argumentum a fortiori* has lost its once dispositive role in interpretation and become a shortcut in reasoning, or a rhetorical argument, meant to put the demonstration beyond any contestation. This apparent devolution from an operative to a merely subsidiary argument is concomitant with and essentially due to the codification of treaty interpretation in the Vienna Convention on the Law of Treaties.[33]

[A] *A Fortiori*, in Between Ockham's Razor and the Principle of Legal Security

Ockham's Razor principle, named after the fourteenth century logician and Franciscan friar William of Ockham, postulates that 'entities should not be multiplied unnecessarily'. It is sometimes identified as the law of parsimony or economy, and stands for the proposition that scientists or, as a matter of fact, lawyers must use the simplest means for arriving at their results. The ICJ often applies this principle of economy of

32. *Maritime Boundary Delimitation (Barbados v. Trinidad and Tobago)*, PCA Case No. 2004-02, Award (11 Apr. 2006), ¶ 198 (emphasis added).
33. *See supra* §9.01.

means, either when it chooses one of the possible legal rules applicable to the case submitted to it, or the arguments to put forward in justification of its decisions. In this context, the argument *a fortiori* is a shortcut to avoid deploying all over again a legal demonstration made elsewhere. It leads to the automatic adoption of a conclusion already reached (either in the same judgment, or in a precedent one).[34] Sometimes, the use of *a fortiori* allows the Court to avoid answering some of the arguments made by the Parties.

Some topical examples serve to illustrate the use of *a fortiori* as a demonstrative shortcut. Thus, in the *Genocide* case, the Court had established in its 1996 judgment on preliminary objections that Serbia and Montenegro (formerly Yugoslavia) had access to the court and was also a party to the Genocide Convention. However, while the 1996 judgment dealt specifically with the former Yugoslavia's participation in the Convention, it was not expressly addressing its status as a member of the United Nations. Since the Court concluded that the latter issue, and thus Serbia's standing, had been impliedly determined in 1996 with res judicata force, it was bound to adopt the same conclusion in relation to the quality of a Party to the Genocide Convention:

> 140. The Court accordingly concludes that, in respect of the contention that the Respondent was not, on the date of filing of the Application instituting proceedings, a State having the capacity to come before the Court under the Statute, the principle of *res judicata* precludes any reopening of the decision embodied in the 1996 Judgment. The Respondent has however also argued that the 1996 Judgment is not *res judicata* as to the further question whether the FRY was, at the time of institution of proceedings, a party to the Genocide Convention, and has sought to show that at that time it was not, and could not have been, such a party. *The Court however considers that the reasons given above for holding that the 1996 Judgment settles the question of jurisdiction in this case with the force of* res judicata *are applicable* a fortiori *as regards this contention, since on this point the 1996 Judgment was quite specific, as it was not on the question of capacity to come before the Court*.[35]

The issue being settled with res judicata force, the Court no longer needed to address other admissibility arguments made by Bosnia, like *forum prorogatum* or estoppel, which would require a full demonstration, but would in any case have led to the same conclusion, that the Court's jurisdiction was an issue definitively established:

> The Court does not therefore find it necessary to examine the argument of the Applicant that the failure of the Respondent to advance at the time the reasons why

34. The role of the precedent is, at least in part, to '*délester le juge d'une partie de sa fonction, en lui permettant de se reposer sur une solution déjà adoptée en la transposant à une autre affaire. Considérée de cette manière, le précédent est un 'raccourci' qu'emprunte le juge: au lieu d'avoir à se reposer une question déjà tranchée, il tint pour acquis le résultat du raisonnement*'. (Mathias Forteau, *Les décisions juridictionnelles comme précédent*, in *Le précédent en droit international* 108 (Pedone 2016)).

35. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment (26 Feb. 2007), ICJ Reports 2007, pp. 101–102, ¶ 140 (emphasis added).

> it now contends that it was not a party to the Genocide Convention might raise considerations of estoppel, or *forum prorogatum*.[36]

In maritime delimitation, one of the questions repetitively raised before the ICJ concerns the effect of insular features on the delimitation line. Without following a general principle, the Court takes into account the general configuration of the coast and the geographical situation of the insular feature, as well as its size. But in the absence of general, established criteria, the Court may compare one feature with others it had to consider in previous cases:

> In the *Maritime Delimitation in the Black Sea* case, for example, the Court held that it was inappropriate to select any base point on Serpents' Island (which, at 0.17 square km was very much larger than the part of Quitasueño which is above water at high tide), because it lay alone and at a distance of some 20 nautical miles from the mainland coast of Ukraine, and its use as a part of the relevant coast 'would amount to grafting an extraneous element onto Ukraine's coastline; the consequence would be a judicial refashioning of geography, which neither the law nor practice of maritime delimitation authorizes' (*Maritime Delimitation in the Black Sea (Romania v. Ukraine), Judgment, I.C.J. Reports 2009*, p. 110, para. 149). These considerations apply *with even greater* [in French, *a fortiori*] force to Quitasueño. In addition to being a tiny feature, it is 38 nautical miles from Santa Catalina and its use in the construction of the provisional median line would push that line significantly closer to Nicaragua.[37]

One may think that the Court's reference to a previous solution illustrates its concern with treating equally similar situations. But if one looks at the bigger picture, one realizes that there is nothing systematic in the reference to solutions reached in the previous cases. For instance, in the case concerning the *Maritime delimitation in the Caribbean Sea and the Pacific Ocean between Costa Rica and Nicaragua*, the Court made no reference either to Serpents Island or to Quitasueño, even though there were some tiny insular features, such as the Palmenta Cays (islets lying at a distance of about one nautical mile from the Nicaraguan coast)[38] and the Paxaro Bovo (a rock situated 3 nautical miles off the coast south of Punta del Mono),[39] whose effect on delimitation needed to be addressed.

The international system is not one of binding precedent. The very reference to a prior decision and the choice of one particular precedent to the exclusion of others are thus decisions entirely within the Court's margin of discretion. When they occur, they are justified either by the parties' heavy reliance upon them in their pleadings or, more often, by the Court's intention to reinforce the persuasiveness of its conclusions. It is then clear that the *a fortiori* reference to a precedent is less a translation of the imperative of legal security and more a rhetorical artifice used by the judge.

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36. *Ibid*.
37. *Territorial and Maritime Dispute* (*Nicaragua v. Colombia)*, Judgment (19 Nov. 2012), ICJ Reports 2012, p. 624, at p. 699, ¶ 202.
38. *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean* (*Costa Rica v. Nicaragua)*, Judgement (2 Feb. 2018), ICJ Reports 2018, ¶ 142.
39. *Ibid.*

[B] *A Fortiori*, a Rhetorical, Indefeasible Argument

Per argumentum a fortiori is an artifice of rhetoric rather than a tool of interpretation. Before the method of interpretation was codified in the Vienna Convention, legal maxims played an important role in legal argumentation. *Per argumentum a fortiori* was even decisive in some of the PCIJ's judgments.[40] At present, it only plays a subsidiary role, and the argumentation could withstand scrutiny even if the *a fortiori* argument were not invoked. It is precisely its subsidiarity that reveals the rhetorical force of the argument *a fortiori*. The aim of rhetoric being to persuade through discourse,[41] the reasonable accumulation of arguments and their proper selection serve this rhetorical aim. Among different rhetorical artifices, *a fortiori* has a particular strength due to its claim to irrefutability. As Robert Kolb stressed, '*[l]'argument tend à frapper l'esprit parce que ce qu'il postule confine à l'évidence*'.[42]

Yet, this purported irrefutability may also be a pitfall for legal reasoning. What appears to be a deductively valid argument may prove in the end to be founded on a misleading presumption. Some of the examples above, where the use of *a fortiori* was either criticized or unclear,[43] stand proof that, in legal demonstration, there is no indefeasible argument. Another warning may come for instance from an older case of the ECHR, where it rejected any automatic application of *a majori ad minus* and warned against the temptation to draw simplistic logical consequences:

> *[I]n the area of human rights he who can do more cannot necessarily do less*. The Convention permits under certain conditions some very serious forms of treatments, such as the death penalty (article 2(1), second sentence), whilst at the same time prohibiting others which by comparison can be regarded as rather mild, for example 'unlawful' detention for a brief period (Article 5(1)) or the expulsion of a national (Article 3(1) of Protocol No. 4). *The fact that it is possible to inflict on a person one of the first-mentioned forms of treatment cannot authorise his being subjected to one of the second-mentioned …*[44]

A fortiori shows that formal logic and legal argumentation do not necessarily go hand in hand, and the lawyer should not succumb to the facility of deceptively simple arguments. To take up Christian Djeffal's conclusions: 'An interpreter using maxims will build upon their "deceptive elegance and simplicity" … Maxims pretend to be derived from legal logic … Yet, like rhetorical figures, they depend upon their suitability in the specific context, and they do not derive from logical imperatives'.[45]

40. *See supra* the PCIJ decisions quoted in §9.02[A]; but also Trinidad/Barbados award, in §9.02[B].
41. According to Aristotle's famous definition, 'rhetoric is the ability to see what is possibly persuasive in every given case'. (Aristotle, *Rhetoric* I.2, 1355b26f-7). *See also* Chaïm Perelman, *Logique juridique, nouvelle rhétorique* 105 (Dalloz 1976).
42. Kolb, *supra* n.14, at 739 (author's translation: 'the argument is striking because it purports to state the obvious'.). *See also* d'Almeida, *supra* n.21, at 232.
43. *See supra*, §9.02[A].
44. *Deweer v. Belgium*, ECtHR App. No. 6903/75, Judgment (27 Feb. 1980), ¶ 53 (emphasis added).
45. Christian Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* 116, 117 (Cambridge 2016).